Office Supreme Court, U.S.
FILED
MAR 20 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1012

STATE OF CALIFORNIA, *Petitioner,*

vs.

ROBERT B. DORADO, *Respondent.*

Petition for Writ of Certiorari To the Supreme Court of the State of California

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

STATE OF CALIFORNIA,	*Petitioner,*
vs.	
ROBERT B. DORADO,	*Respondent.*

Petition for Writ of Certiorari To the Supreme Court of the State of California

The State of California prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in the above case on January 29, 1965.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, printed in Appendix A hereto, *infra*, pp. 1-36, is reported in 62 A.C. 350, 398 P.2d 361 (Jan. 29, 1965).

JURISDICTION

The Supreme Court of the State of California first entered judgment in this case on August 31, 1964. A timely Petition

for Rehearing, filed on September 15, 1964, was granted on September 24, 1964. On rehearing the Supreme Court of the State of California entered its judgment in this case on January 29, 1965.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Is a free and voluntary confession by a state prisoner, who has neither requested nor been refused counsel, inadmissible in a state criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise the suspect of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a state prisoner, who has neither requested nor been refused counsel, inadmissible by reason of the Constitution of the United States because the prosecution did not establish that the suspect at the time of the questioning made a knowing and intelligent waiver of both (1) his right to consult with counsel and (2) his right to remain silent?

STATEMENT OF THE CASE

On February 1, 1962, the Grand Jury of Marin County returned an indictment charging Robert B. Dorado with committing an assault with malice aforethought resulting in the death of a fellow prisoner at San Quentin Prison, where Dorado was undergoing a life sentence (CT 1-2).[1]

Dorado was found guilty by a jury of violating section

1. "CT" refers to the Clerk's Transcript and "RT" refers to the Reporter's Transcript of the proceedings in the state trial court, enclosed as part of the record.

4500 of the California Penal Code as charged in the indictment (CT 53, 54), and was thereupon sentenced to death (CT 72).

On automatic appeal to the Supreme Court of California, the conviction was reversed. Thereafter, that court granted Petitioner's Petition for Rehearing,[2] and thus set aside its original decision. On rehearing the Supreme Court of California again reversed the judgment of conviction (Appendix A).

STATEMENT OF FACTS

The opinion of the Supreme Court of California contains a summary of the events, commencing with discovery of the body of the victim within the prison yard and culminating in Dorado's confessions (Appendix A, *infra*, pp. 2-5).

The essential facts may be summarized as follows:

The brutally stabbed body of Abel Nevarez was discovered in the prison yard at the California State Prison at San Quentin (RT 406, 582). Physical evidence found at the scene of the crime, and both in and near Dorado's cell, pointed to Dorado as the murderer (RT 495-98, 500-01, 535-37, 542-45, 556, 560, 562-64, 567-69, 1085, 1125, 1135). When first questioned by members of the District Attorney's office on the afternoon of the murder, Dorado gave a full confession (RT 872, 897-98). When examined that same evening by prison psychiatrists, Dorado gave a detailed account of the crime expressing remorse and explaining why he had done the stabbing (RT 1151-52, 1279). The next morning Dorado wrote out a confession and took the investigators over the route of the crime (RT 921, 923-31). Two days later, when another convict had been implicated in the killing, Dorado confessed again to the events, but included the participation of the other accused (RT 947-50).

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2. Fifty-one District Attorneys and 233 Sheriffs and Chiefs of Police joined in the Petition for Rehearing.

Dorado's confessions were determined by the trial court to have been free and voluntary and this finding was accepted by the Supreme Court of California (Appendix A, *infra*, p. 5).

At no time during the several interrogations did Dorado request that he be permitted to consult with an attorney (RT 951).

Dorado was not advised that he had a right to counsel or that he had a right to remain silent (RT 836). However, Dorado did not testify that he was unaware of his right to consult with counsel, nor did he testify that he was unaware of his right to remain silent. Dorado at no time claimed that he confessed because of any unawareness of his right to consult with counsel or his right to remain silent.

HOW THE FEDERAL QUESTION AROSE

At the very outset of its opinion,[3] the Supreme Court of California made it clear that the controlling issue in the case was one arising under the Constitution of the United States:

> "The main issue of this case involves the admission into evidence of defendant's confessions. For the reasons which we set out hereinafter we have concluded that in the light of recent decisions of the United States Supreme Court the confessions, as obtained in this case, should have been excluded; their admission requires reversal." (Appendix A, *infra*, p. 1).

Moreover, even though the court found that the confessions of Dorado were free and voluntary, it nevertheless

3. All references herein to the opinion of the California Supreme Court are to the opinion on rehearing printed in Appendix A, *infra*, pp. 1-36, and reported in 62 A.C. 350, 398 P.2d 361 (Jan. 29, 1965) and not to the earlier opinion reported in 61 A.C. 892.

felt compelled by the recent decisions of this Court in *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), to hold the confessions constitutionally inadmissible.

The court clearly indicated its reliance upon the *Escobedo* and *Massiah* decisions as compelling the result reached in the instant case:

> "Although we accept the finding of the trial court that the confessions of defendant were not obtained by coercion, we have concluded that they should not have been admitted into evidence under recent rulings of the United States Supreme Court. . . . Since we must faithfully discharge our duty to apply to the instant case the Constitution of the United States as interpreted by the Supreme Court of the United States, we must follow these recent decisions." (Appendix A, *infra*, pp. 5-6).

The important federal constitutional question here presented was framed by the California Supreme Court's characterization of the case:

> "The facts of the instant case bring it squarely within the rule of *Escobedo* with the exception that Dorado did not retain or request counsel." (Appendix A, *infra*, p. 8).
>
> "The question presented here, then, centers upon whether the failure of the accused to retain or request counsel justifies the application of a rule of law different from that established in *Escobedo*." (Appendix A, *infra*, p. 9).

Having thus framed the federal constitutional question, the California Supreme Court proceeded to articulate the answer which it concluded was compelled by this Court's decision in *Escobedo v. Illinois*, *supra*. Consequently, the court held that Dorado's free and voluntary confessions

were improperly admitted in evidence in violation of Dorado's constitutional rights. In conclusion, the court clearly stated its resolution of the federal constitutional question presented, and its reliance upon the decisions of this Court as compelling the conclusion reached:

> "Summarizing the principal issue on the confession, we must decide this case in conformity with the decisions of the Supreme Court of the United States. That court having declared the content of a constitutional right, it is our function to enforce it in situations wherever it logically applies. To do otherwise would, in effect, be to distort the United States Constitution itself.
>
> "We cannot say here that because defendant did not speak the words of a request for counsel we need not apply the United States Supreme Court decisions; the constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself. We cannot compress a constitutional right, expressed by the United States Supreme Court, into the shape of a frozen formalism." (Appendix A, *infra*, p. 21).

The opinion of the Supreme Court of California makes it manifestly clear that the decision does not rest in any degree on a ground of state law. The decision rests solely and expressly upon the federal constitutional ground.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The Decision Below Presents a Federal Constitutional Question Not Previously Determined by This Court Which Is of Great Importance to the Administration of Criminal Justice.

The California Supreme Court has decided a federal constitutional question not previously determined by this Court: whether the Constitution of the United States ren-

ders inadmissible a free and voluntary confession solely because of the absence of any warning to the accused of his right to consult with counsel and his right to remain silent, though the accused neither requested nor was refused counsel.

The California court has determined that the Constitution of the United States *compels* rejection of a free and voluntary confession when:

> "(1) the investigation was no longer a general inquiry into an unsolved crime, but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) *the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.*" (Emphasis added.) (Appendix A, *infra*, pp. 16-17).

A. The decision of the Supreme Court of California is an unwarranted extension of the decision in Escobedo v. Illinois, 378 U.S. 478 (1964).

The opinion of this Court in *Escobedo* clearly indicated that the holding was dependent upon the circumstances there presented, and prominent among those circumstances was the refusal of the accused's request to consult with his retained counsel. That decision thus by necessity focused on the constitutional effect of a confession secured after a denial of a request for counsel upon a conviction based on that confession:

> "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory

upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." *Escobedo v. Illinois*, 378 U.S. 478, 479 (1964).

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." *Id.* at 490-91.

However, the Supreme Court of California concludes that the condition that an accused must have retained or requested counsel is a "formalistic distinction" *not permitted* by this Court's opinion in *Escobedo* (Appendix A, *infra*, p. 9). In thus completely rejecting a condition clearly relied upon by this Court as an element necessary to its holding in *Escobedo*, the Supreme Court of California has created an extension of the constitutional rule announced in *Escobedo* and, as a consequence, has fashioned a new right under the Constitution of the United States.

B. The California decision is inconsistent with the decisions of this Court in Crooker v. California, Cicenia v. Lagay, and Haynes v. Washington.

In creating its extension of a constitutional interpretation by this Court, the Supreme Court of California erroneously resorted to an analysis which is inconsistent with the decisions of this Court.

It is apparent from examination of the decisions of this Court that a failure to warn an accused of his right to consult with counsel and his right to remain silent, or for that matter, an outright denial of a request to consult with counsel, is only an attendant circumstance to be considered in determining whether there was fundamental prejudice requiring exclusion of the confession.[4] For example, this conclusion is borne out by the discussion in the *Escobedo* opinion of the *Crooker* case. Crooker had requested the very right denied Escobedo, that is, the right to consult counsel, and that right had been denied him. This Court in the *Crooker* case rejected the absolute rule sought by Crooker that every state denial of a request to contact counsel was an infringement of the constitutional right without regard to the circumstances of the case. Far from disapproving this language, this Court in *Escobedo* quoted, presumably with approval, the rule announced by *Crooker* in place of the rule sought by the accused:

> "'[S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, . . . *but also if he is deprived of counsel for any part of the pretrial proceedings*, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of

4. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Haynes v. Washington*, 373 U.S. 503 (1963); *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. Lagay*, 357 U.S. 504 (1958).

> justice. . . .' The latter determination necessarily depends upon all the circumstances of the case.' 357 U.S. at 439-440." (Emphasis added.) 378 U.S. at 491.

This Court in *Escobedo* referred to the language of the *Crooker* Court in applying these principles to the "'sum total of the circumstances during the time petitioner was without counsel'" and acknowledged that Crooker had not been fundamentally prejudiced by the denial of his request for counsel. 378 U.S. at 491. Therefore, we must conclude that even a denial of a request for counsel is not fatal to a statement if the suspect is not fundamentally prejudiced by the denial of his request.

Further, examination of *Haynes v. Washington, supra*, forecloses the position that the mere failure to warn an accused of his right to consult with counsel and his right to remain silent, in and of itself, compels rejection of any incriminating statement made thereafter.

C. By equating the right to counsel at trial with the right to counsel during a police investigation, the California court has created a novel and unworkable rule without any support in the decisions of this Court.

The Supreme Court of California has transplanted to the "accusatory stage" of a police investigation the doctrine of waiver heretofore applicable only to formal judicial proceedings. The California court has thus equated the absolute right to representation of counsel at the trial stage[5] with the right of an accused, upon request, to consult with counsel at the accusatory stage of the proceedings prior to the commencement of the judicial process. The decisions of this Court draw no such parallel.

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5. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Carnley v. Cochran*, 369 U.S. 606 (1962).

Moreover, the California court has held that an incriminating statement is inadmissable in the absence of evidence that the suspect intelligently and knowingly waived his right to remain silent in addition to his right to the assistance of counsel. (Appendix A, *infra*, pp. 9, 15). Upon this basis the court held that the failure of the investigating officers to inform the suspect of both of these rights precludes a finding that he knowingly waived them.

This absolute and inflexible requirement of an intelligent waiver of two constitutional rights before a voluntary and truthful statement may be received in evidence has been accomplished without any substantial support in decisions of this Court, the intermediate federal appellate courts or state courts. The only authority cited is a footnote buried in the *Escobedo* opinion (378 U.S. 490, n. 14) and a decision of the Ninth Circuit Court of Appeals in a habeas corpus case, *Griffith v. Rhay*, 282 F.2d 711, 717 (9th Cir. 1960).

To our knowledge no federal court has ever announced a rule of this breadth and nature as a constitutional mandate and, for that matter, no federal appellate court has imposed such a rule even under its supervisory authority. See, *e.g.*, *Jackson v. United States*, 337 F.2d 136 (D.C. Cir. 1964); *Davis v. North Carolina*, 339 F.2d 770 (4th Cir. 1964); *United States v. Denno*, 339 F.2d 872 (2d Cir. 1964).

The significance of the California decision may be appraised in at least one respect by visualizing some of the problems which must inevitably confront peace officers throughout this state and throughout the United States, if the determination of the California court is allowed to stand.

Advising a suspect of his rights is only the beginning of the problem. The real problem lies in the requirement that in every case there must be evidence of an intelligent and knowing waiver of those rights. The reports of the federal

and state courts are full of decisions where judges have advised suspects of their rights but have failed, in the view of other judges, in determining that there had been an intelligent and knowing waiver.[6]

Determination of whether there has been an intelligent waiver must depend upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The decision of the California court places the making of this determination, which is ordinarily the "serious and weighty responsibility" of the trial judge (*Id.* at 465) upon the police officer. Under California law as it is applicable to waiver of right of counsel at trial:

> "[T]he court cannot accept a waiver of counsel from any one accused of a serious public offense without first determining that he 'understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted.'" *In re James*, 38 Cal.2d 302, 313, 240 P.2d 596, 603 (1952).

We will not labor the point that any such requirements as these, if applied to police officers, will make the interrogation of suspects practically impossible.

D. The rule announced by the California court ignores the concept of fundamental prejudice and poses a serious threat to the confidence of the people in our system of criminal justice.

In addition to the reasons which we submit make the rule announced below unworkable, it may strike a fatal blow to the confidence of the people in our system of criminal jus-

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6. See, *e.g.*, *Moore v. Michigan*, 355 U.S. 155 (1957); *People v. Chesser*, 29 Cal.2d 815, 178 P.2d 761 (1947); *In re Johnson*, 62 A.C. 336, 398 P.2d 420 (Jan. 28, 1965).

tice. Until the first *Dorado* opinion was handed down on August 31, 1964, it had not been the practice of law enforcement officers in California to advise suspects of their right to counsel or right to remain silent before questioning them in regard to a suspected commission of a crime. Both this Court[7] and the California Supreme Court[8] had theretofore uniformly held that there was no such constitutional or statutory requirement. Consequently, our prisons, both state and federal, are full of men and women who committed serious and violent crimes and whose convictions were founded in part on confessions or admissions which were wholly voluntary and truthful but which were not preceded by the advice now required by the decision below.

With some 29,000 prisoners in state prisons in California, it is no exaggeration to suggest that the convictions of thousands of dangerous criminals may be in jeopardy under this ruling.

In a companion case, decided the same day as the decision below, the California court recognized and sought to deal with this problem. *In re Lopez*, 62 A.C. 380, 398 P.2d 380 (Jan. 29, 1965). The *Lopez* opinion is important because it sets forth, clearly and distinctly, what the California court deems to be the motivation behind the *Escobedo* decision and, more importantly, the purpose of its own *Dorado* rule.

The California court, in refusing to apply its decision below retroactively, was explicit in holding that the *Dorado* rule has nothing to do with the protection of innocent people:

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7. *Haynes v. Washington, supra; Crooker v. California, supra; Cicenia v. Lagay, supra.*

8. *People v. Ditson*, 57 Cal.2d 415, 369 P.2d 714 (1962); *People v. Garner*, 57 Cal.2d 135, 367 P.2d 680 (1961); *People v. Kendrick*, 56 Cal.2d 71, 363 P.2d 13 (1961); *People v. Crooker*, 47 Cal.2d 348, 303 P.2d 753 (1956).

> "Whatever the inadequacies of our prior procedures, we do not believe that they carried a substantial risk of the conviction of an innocent person because of the use in evidence of his voluntary statement." *In re Lopez, supra,* 398 P.2d at 386.

The California court distinguishes the decisions of this Court dealing with right to counsel at trial and on appeal and to a transcript on appeal, as well as those cases involving involuntary confessions, since:

> "To reject the retroactivity of the above constitutional rights would be to sanction the continued incarceration of a defendant despite errors at the trial which, upon correction, could well establish his innocence." *Ibid.*

The California court also declares that what it calls the *Escobedo* rule—actually its own *Dorado* rule—does not "emanate from the inherent unreliability of the confessions introduced in the trials of the past or from the uncertainty of the guilt of those who had thus confessed. . . ." *Ibid.*

The California court attributes to this Court the following purpose:

> "The court sought to discourage oppressive practices; it did not seek to undo the procedures of yesterday, which despite their undesirability did not necessarily cause the conviction of the innocent." *Id.* at 386-87.

Moreover, the California court makes the following comment in a footnote:

> "This reason does not relate to the erroneous conviction of the innocent since rarely do guiltless persons voluntarily confess." *Id.* at 387, n. 12.

Not only does the decision below serve no purpose in protecting the innocent—according to the California Supreme

Court—but it also does not assure or contribute to a fair trial: "In the instant case we have held that the error proscribed by *Escobedo* did not affect the fairness of the trial. . . ." *Id.* at 391, n. 23.

We conclude then that the California Supreme Court has effected a revolution in the investigation of criminal offenses and fashioned from whole cloth a set of procedures to be followed by police officers, never before required by any court and never required in California by statutory or constitutional law. Moreover, we find that this set of rules has been formulated not to prevent the use of unreliable evidence, not to prevent the conviction of the innocent, and not to assure anyone of a fair trial. The only purpose of this set of rules is to discourage what are thought to be oppressive and undesirable police practices, presumably in some case other than the case at bar, since there were no such practices in this case,[9] and which will serve to prevent in some other case at some other time and in some other place the use of a coerced confession.

Since the requirements of a formalistic ritual of advising a suspect of his rights and the imposing obstacle of establishing a waiver are not founded on the purpose of protecting innocent people or assuring a fair trial, we submit that these requirements find no home in the Constitution of the United States. This Court recognized in *Crooker*, and impliedly approved the rule in *Escobedo*, that due process is violated by deprivation of counsel in pre-trial proceedings only when the accused is so prejudiced thereby as to

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9. The *Dorado* case was a peculiarly inappropriate case for the court to launch into a discussion of this kind because there was no claim of brutality at any time. Although there was testimony by Dorado that he had been the victim of threats by the investigating officers, the trial judge and jury found that these were not true. Yet, the trial judge did find that the confession of a co-defendant, Jiminez, was in fact involuntary and upon timely motion granted a new trial.

infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice. *Crooker v. California*, 357 U.S. 433, 439-40 (1958); *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964). The California court has departed from this principle on the theory that *Escobedo* required it to do so. It is imperative that this Court determine the question and reaffirm the settled constitutional principle.

2. The California Decision Is Contrary to the Decisions of Most State and Federal Courts on This Question and This Conflict Among the Courts Must Be Resolved in Order to Restore Stability to the Administration of Criminal Justice.

The writ of certiorari should also be granted because of the importance of resolving the conflict now existing between the decisions of the highest courts of several states which have been presented with this important federal constitutional question.

The decision of the Supreme Court of California, purporting as it does to delineate the limits of the constitutional standards pronounced by the decision of this Court in *Escobedo v. Illinois*, stands in conflict with decisions of the highest courts of the states of Illinois, Pennsylvania, Wisconsin, Ohio, Maryland, Nebraska, and Nevada.[10] Thus, the Supreme Court of California has declared:

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10. *People v. Hartgraves*, 202 N.E.2d 33 (Ill. 1964), *petition for cert. filed*, 33 U.S.L.Week 3278-79 (U.S. Feb. 9, 1965) (No. 894); *Commonwealth v. Coyle*, 203 A.2d 782 (Pa. 1964); *Browne v. State*, 131 N.W.2d 169 (Wis. 1964); *State v. McLeod*, 203 N.E. 2d 349 (Ohio 1964); *Anderson v. State*, 205 A.2d 281 (Md. 1964); *State v. Worley*, 132 N.W.2d 764 (Neb. Jan. 29, 1965); *Morford v. State*, 395 P.2d 861 (Nev. 1964); see *State v. Fox*, 131 N.W.2d 684 (Iowa 1964). All these decisions have uniformly held refusal of an accused's request for counsel an indispensable condition of the constitutional rule enunciated by this Court in *Escobedo v. Illinois*. In New York and New Jersey, where to our knowledge the highest courts have not yet spoken on the issue, the intermediate appellate courts are in accord. *People v. Agar*, 253 N.Y.S.2d 761 (1964); *People v. Scanlon*, 84 N.J.Super. 427, 202 A.2d 448 (1964).

> "*Escobedo* holds that defendant's right to counsel matured at the accusatory stage: 'the "stage when legal aid and advice" were most critical' to defendant: therefore, this vocalization of that right cannot be the determinative factor." (Appendix A, *infra*, p. 9).

By contrast, the Supreme Court of Pennsylvania has concluded:

> "[A]ppellant did not ask for the assistance of counsel. [Footnote omitted.] We note that this, in itself, is not controlling since if such assistance were constitutionally required, the right thereto would not depend on a request: Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 (1962). However, this factor substantially distinguishes the present case from the situation presented in Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Further, we do not interpret Escobedo to mean that, counsel must immediately be afforded one taken into custody, under all the circumstances, particularly where none is requested." *Commonwealth v. Coyle*, 203 A.2d 782, 794 (Pa. 1964).

The Supreme Court of Iowa has stated:

> "It appears from the Escobedo case that each case must largely turn upon its own facts, . . . but we are satisfied the holding in that case was predicated upon those facts which disclosed a police interrogation of the accused when his attorney was being excluded and was unable to advise him." *State v. Fox*, 131 N.W. 2d 684, 686 (Iowa 1964).

The Supreme Court of Wisconsin announced:

> "The only similarity between those facts [present in the *Escobedo* case] and the facts present here is that defendant Browne was not advised of his con-

stitutional right to remain silent. He made no request to consult with an attorney nor did any attorney seek to confer with him. We deem that this fully distinguishes Escobedo and that it does not control the result here.

"With respect to the failure to advise defendant of his constitutional right to remain silent, . . . the most that Escobedo holds in this respect is that the failure to so inform a criminal suspect under arrest, when coupled with other circumstances, may be sufficient to require exclusion of any admission made by him." *Browne v. State*, 131 N.W.2d 169, 171-72 (Wis. 1964).

Only Oregon and Rhode Island have followed the interpretation of the California Supreme Court.[11] But the highest courts of other states, when expressly confronted with the decision of the California court, have indicated their disagreement with it.[12]

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11. *State v. Neely*, 398 P.2d 482 (Ore. Jan. 27, 1965); *State v. Dufour*, 206 A.2d 82 (R.I. Jan. 8, 1965).

12. "[W]e are mindful of apparently contrary conclusions reached in State v. Neely . . .; and People v. Dorado, 40 Cal. Rptr. 264, 394 P.2d 952. . . ."

"We do not, however, read the Escobedo case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt." *People v. Hartgraves*, 202 N.E.2d 33, 35-36 (Ill. 1964).

"We believe that Dorado has extended the limited holdings of Massiah and Escobedo." *Morford v. State*, 395 P.2d 861, 865 (Nev. 1964).

It should be noted that these opinions refer to the original opinion of the Supreme Court of California vacated upon rehearing being granted. However, the decision of the California court rendered upon rehearing and in issue here reaches the same result, and utilizes the same analysis as the original opinion. Thus, the comments of the Illinois and Nevada Supreme Courts upon the original *Dorado* opinion would appear to retain validity.

The clear conflict which now exists among the highest courts of several states in the interpretation and application of such an important constitutional standard should not be suffered to exist. The conflict can only become more involved as the highest courts of other states are presented with the issue. Meanwhile, criminal suspects in the various states will receive unequal treatment because of the conflicting interpretations of an important federal constitutional standard declared by the highest courts of the several states.

Moreover, the confusion is compounded by the exercise of federal habeas corpus jurisdiction. Respected United States Courts of Appeal are in diametric conflict on the nature of the constitutional rule governing the admissibility of confessions they must apply when a state conviction is challenged.[13]

Confusion and unequal treatment will continue until this Court grants review and provides definitive guidelines for all jurisdictions.

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13. Compare *Davis v. North Carolina*, 339 F.2d 770 (4th Cir. 1964) and *United States v. Denno*, 339 F.2d 872 (2d Cir. 1964) with *Wright v. Dickson*, 336 F.2d 878 (9th Cir. 1964) (dictum).

CONCLUSION

For the reasons discussed above, we respectfully submit that certiorari should issue to review the decision of the court below.

Dated: San Francisco, California

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(Appendix A Follows)

Appendix A

In the Supreme Court of the State of California

In Bank

Crim. 7468

THE PEOPLE,
Plaintiff and Respondent,

v.

ROBERT B. DORADO,
Defendant and Appellant.

OPINION

Defendant appeals from a judgment on a verdict finding him guilty of violation of Penal Code section 4500, which provides for the automatic penalty of death. The indictment charged defendant, a 26-year-old prisoner serving a life term for sale of marijuana, with malicious assault with a deadly weapon which resulted in a fellow prisoner's death. The court denied defendant's motion for a new trial. Penal Code section 1239, subdivision (b), provides for an automatic appeal.

The main issue of this case involves the admission into evidence of defendant's confessions. For the reasons which we set out hereinafter we have concluded that in the light of recent decisions of the United States Supreme Court the confessions, as obtained in this case, should have been excluded; their admission requires reversal. For guidance of the court upon retrial we set forth why we have rejected

defendant's contentions that the evidence failed to show that he was validly imprisoned under a life sentence and that the court failed properly to instruct the jury. We do not discuss defendant's remaining arguments because the factual situations upon which they rest will in all likelihood not recur.

The Confessions

The facts of this case show the background and occasion for defendant's confessions. According to prison officers, they discovered, at about 8:00 a.m. on December 12, 1961, the body of one Nevarez in the lower yard behind the bleachers and near the industrial quonset huts at San Quentin Prison. About 20 minutes later medical personnel pronounced the victim dead upon arrival at the prison hospital. The nature of the chest wounds of the victim showed that they could have been inflicted by a small knife and that the victim probably had been physically restrained during the killing.

Correctional officers undertook an immediate investigation and discovered, in a trashcan in a nearby restroom, a bloodstained blue denim jacket with the prison identification number cut out, the name "Dorado"[1] on the pocket, and a button missing. In the same trashcan they found a melton jacket with the number removed and a sharpened knife with a taped handle. They found the button belonging to the blue denim jacket at the scene of the homicide. The officers discovered in another trashcan a second sharpened knife with a taped handle stained with blood.

When the officers located defendant in his cell around 9:00 a.m. he was attired in his underwear. Upon their

1. Defendant was the only prisoner in San Quentin named "Dorado."

request that he dress, he donned clean clothing. The officers found no worn clothing in his cell but did discover a roll of tape similar to that used to tape the knife handles. Under a stack of soiled clothing in a clothes hamper the officers found defendant's bloodstained trousers.

Captain Hocker, an official of San Quentin Prison, testified that the officers brought defendant to his office between 9:00 a.m. and 10:00 a.m. In order to examine defendant for superficial cuts and scratches, Captain Hocker requested that defendant strip to the waist. Immediately thereafter defendant dressed again. When defendant was shown the jacket on which his name appeared he made no comment, but upon being told that Nevarez was dead defendant wept. Captain Hocker then requested Officer Glazier to take defendant to the hospital laboratory in order that a technician might remove and test some brown flecks on defendant's hands which appeared to be dried blood. After defendant's return about an hour later, Mr. Midyett from the district attorney's office arrived.

Mr. Midyett and Captain Hocker testified that early in the afternoon, in the course of an interrogation lasting about two hours, defendant admitted the killing. Both testified, further, that on the next morning, December 13, at his cell in the adjustment center, defendant, in the presence of Mr. Midyett, gave a written statement. Thereafter, defendant escorted Mr. Midyett and a prison officer over the route he had taken in the course of the killing, discussing with them certain details of the crime. On December 15, and after codefendant Jiminez had been apprehended on suspicion of complicity, a third interrogation took place. On this occasion defendant implicated Jiminez as the accomplice who held Nevarez.

At the trial Captian Hocker testified that he not only initially interrogated the defendant but had been present during the major part of defendant's interrogation by members of the district attorney's office. On cross-examination, Captain Hocker was asked, "Did you see or hear anybody mention to Mr. Dorado his right to counsel?" and "Or his right not to incriminate himself or testify against himself?" To both questions, he answered in the negative. Mr. Midyett testified to the same effect.

Defendant's testimony on *voir dire* conflicted sharply with the testimony of the officers. Defendant claimed that he had not freely and voluntarily confessed, but had fabricated the confession partly because he feared threats made by Captain Hocker at an initial interrogation on the morning of December 12. This was the only occasion upon which he and Captain Hocker engaged in conversation alone and without benefit of a tape recorder. Defendant further claimed that upon hearing of the death of Nevarez, who was his friend, he became grief-stricken and susceptible to influence, and that moreover he was under the narcotic effects of glue.

Defendant also testified that Captain Hocker forced him to strip and stand completely naked in his office for some 20 minutes or more. He stated that Captain Hocker swore at him and threatened to brand him an informer and turn him loose in the prison yard to be subjected to the retribution of the other prisoners if he did not cooperate. Finally, defendant claimed that Captain Hocker indicated that he would see that defendant did not get the death penalty if he confessed, thus implying that defendant would not be prosecuted under Penal Code section 4500. Defendant further testified that the influence of these coercive pressures continued in his mind so that he subsequently fab-

ricated the confessions to avoid placing his life in jeopardy at the hands of other prisoners because they might be told that he informed on the real culprit. Captain Hocker denied these facts in every detail and stated that he treated defendant respectfully in view of his obvious remorse.

Defendant argues that Captain Hocker's language and inducements in extracting a confession from Jiminez indicate the truth of his own assertion of coercion. The trial court did in fact rule that the Jiminez confession was the result of coercion. The treatment accorded Dorado, however, differed from that given Jiminez. This difference, Captain Hocker explained, occurred because Dorado's attitude was quiet and subdued, so that no one could be angry with him, and because he confessed readily under interrogation, whereas Jiminez proved obdurate.[2] Furthermore, Captain Hocker noted that the coerced Jiminez confession came several days after defendant's and was preceded by sustained and frequently abusive questioning coupled with solitary confinement.

Although we accept the finding of the trial court that the confessions of defendant were not obtained by coercion, we have concluded that they should not have been admitted into evidence under recent rulings of the United States Supreme Court. In a long series of cases that court has been troubled by confessions obtained without protection

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2. Captain Hocker gave the following testimony: "By contrast, Jiminez was arrogant and disrespectful. Another reason for taking a different approach was because this is a modus operandi I used many times in interrogations where people are participating, and in the vernacular it is the good guy-bad guy approach [*] I was a bad guy. I growled at him and left the room and my partner assumed the testimony—the interrogation."

*Also termed the "Friendly-Unfriendly" act. For a description of this technique, see Inbau and Reid, *Criminal Interrogation and Confessions* (1962) pp. 58-60.

of counsel;[3] this historic concern of the court culminated in two recent decisions: Massiah v. United States (1964) 377 U.S. 201, and Escobedo v. Illinois (1964) 378 U.S. 478. Since we must faithfully discharge our duty to apply to the instant case the Constitution of the United States as interpreted by the Supreme Court of the United States, we must follow these recent decisions.

Massiah holds that the prosecution cannot introduce into evidence defendant's "own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." (377 U.S. at 206.) Defendant, who had been indicted for violation of the federal narcotics laws, had retained counsel. After defendant's release on bail, a federal agent arranged with one Colson, who had been jointly indicted with defendant, for the installation in Colson's car of a radio transmitter. This device enabled the agent, through a receiving set in a car parked down the street, to listen to Colson's conversation with defendant. The statements of defendant thus elicited were presented to the jury through the agent's testimony. Reversing the conviction, the Supreme Court held that the defendant had been denied the assistance of counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." (*Id.* at p. 206.) Referring to Spano v. New York (1959) 360 U.S. 315, the court commented: "It was said that a Constitution which guarantees a defendant the aid of counsel at . . . a trial could

3. See, for example, Haynes v. Washington (1963) 373 U.S. 503; Gallegos v. Colorado (1962) 370 U.S. 49; Culombe v. Connecticut (1961) 367 U.S. 568; Crooker v. California (1958) 357 U.S. 433. For a more complete list of citations, see Spano v. New York (1959) 360 U.S. 315, 321 n.2.

surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' 360 U.S. at 326. (Douglas, J. concurring.)" (Massiah v. U.S., supra, 377 U.S. 201, 204.)

Escobedo recognizes that this critical stage may be reached before indictment. In that case a 22-year-old defendant was arrested and interrogated about the fatal shooting of his brother-in-law. After retaining a lawyer, he obtained his release on habeas corpus because of the insufficiency of the evidence against him. Ten days later, upon being told by one DiGerlando that Escobedo had fired the fatal shots, the police again arrested Escobedo and brought him to police headquarters between 8:00 and 9:00 p.m. During the ensuing interrogation, Escobedo repeatedly requested to see his lawyer, who arrived at the station about 10:30 p.m. that evening, but the police ignored his request and continued their questioning. By 10:15 p.m. they had elicited from Escobedo an admission which indicated that he knew something of the crime. By 11:30 p.m. he had given the police and the prosecution attorneys a full confession.

The United States Supreme Court held that "where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent,

the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (Escobedo v. Illinois, supra, 378 U.S. 478, 490-491.) In its conclusion the court stated: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (*Id.* at p. 492.)

The facts of the instant case bring it squarely within the rule of *Escobedo* with the exception that Dorado did not retain or request counsel. Thus the two cases parallel each other in the following respects: (1) The investigation in the instant case had ceased to be a general inquiry into an "unsolved crime" and had begun to focus on defendant. The weight of the circumstantial evidence recited above and available to the officers at the point of interrogation provided reasonable grounds for focusing upon defendant as the particular suspect. If anything, the evidence against defendant at the time of interrogation was more conclusive than that marshalled against Escobedo. (2) The defendant was in custody. (3) The officers did not merely engage in general questioning but subjected defendant to a process of interrogations that lent itself to obtaining incriminating statements. Their purpose in so doing was "to elicit a confession" (Escobedo v. Illinois, supra, 378 U.S. 478, 492), "to 'get him' to confess his guilt despite his constitutional right not to do so." (Escobedo v. Illinois, supra, 378 U.S. 478, 485.) (4) The record shows that the authorities did not

in any manner warn defendant of his "absolute constitutional right to remain silent." (*Id.* at p. 491.) Captain Hocker and Mr. Midyett both testified that no such warning was ever given to defendant.

The question presented here, then, centers upon whether the failure of the accused to retain or request counsel justifies the application of a rule of law different from that established in *Escobedo*. The basic reasoning of the court's opinion in *Escobedo* will not permit such a formalistic distinction.

As we shall explain in more detail hereinafter, *Escobedo* holds that defendant's right to counsel matured at the accusatory stage: "the 'stage when legal aid and advice' were most critical" to defendant; therefore, his vocalization of that right cannot be the determinative factor. The United States Supreme Court and many other courts have recognized that in the situation in which a defendant is entitled to counsel the request itself can be no more than a formality; indeed, any such requirement would discriminate in favor of the sophisticate in the ways of the criminal court. If, however, the officers inform the accused of his right to counsel, he may waive it, and in such event his confession may be introduced into evidence. *Escobedo* also holds that the accused has the right to remain silent and that he must likewise waive that right if his self-incriminatory statements are to be admitted against him.

Escobedo holds that a defendant must be afforded his right to counsel as soon as ". . . the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession. . . ." (Escobedo v. Illinois, supra, 378 U.S. 478, 492.) The power of the state to extract from the individual the incriminating statements which may be crucial to his defense can take effect before

the formality of indictment. After custody the interrogation may become the critical stage in the establishment of the prosecution's case. "There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and *the criticalness of that stage to the accused in his need for legal advice.*" (Italics added.) (*Id.* at p. 488.) In holding that defendant should have "the guiding hand of counsel" (Powell v. Alabama (1932) 287 U.S. 45, 69) at the accusatory stage, *Escobedo* states, "This was the 'stage when legal aid and advice' were most critical to petitioner. *Massiah v. United States, supra,* at 204. It was a stage surely as critical as was the arraignment in *Hamilton v. Alabama,* 368 U.S. 52, and the preliminary hearing in *White v. Maryland,* 373 U.S. 59. What happened at this interrogation could certainly 'affect the whole trial,' *Hamilton v. Alabama, supra,* at p. 54, since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' *Ibid.*" (*Id.* at p. 486.)

In a decision that preceded *Massiah* and *Escobedo* this court recognized that the accused has a right to counsel at this critical accusatory stage. In the prophetic words of Justice Schauer, writing for the court in People v. Lopez (1963) 60 Cal.2d 223, 243: "Neither Article I, section 13, nor the statutes implementing the right granted therein, should be construed in a manner that would hamper legitimate police investigation when no substantial right of the accused is involved. We do not believe that the accused has a right to have counsel present during *purely investigatory activities* which are *not* designed to elicit information *from the accused* or *otherwise* impinge upon his constitutional rights." (Italics added.)[4]

4. See discussion of Justice Friedman, in People v. Sigal (1963) 221 Cal.App.2d 684, 703.

The right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it. The accused's request for counsel indicates no more than that he, himself, at that point in the proceedings, perceived the need of legal assistance. The request merely constitutes evidence that the accused finds himself in an accusatory predicament. *Escobedo* did not treat the request for counsel as the reason for the establishment of the right; it points out that the right had previously crystallized in the accusatory stage. "When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation *had* ceased to be a general investigation of 'an unsolved crime.' [Citation omitted.] Petitioner *had* become the accused, and the purpose of the interrogation *was* to 'get him' to confess his guilt despite his constitutional right not to do so." (Italics added.) (Escobedo v. Illinois, supra, 378 U.S. 478, 485.) Thus the sequence of events had occurred to fix the stage as the critical one; the investigation had become accusatory; the purpose was to get him to confess. The request for counsel could not *cause* these events; the prosecution did not conceive the purpose of getting Escobedo to confess *because* he requested counsel.[5]

The United States Supreme Court and other courts have recognized that in a situation in which a suspect has the

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5. "Implicit in *Escobedo* is the proposition that in a pretrial police interrogation the accused has a right to remain silent, which he must waive intelligently before any self-incriminating statements will be admissible at trial. At the very least the Court held that where the accused has not been effectively warned of his right to remain silent, he is entitled to counsel to enforce that right if he has retained and requested counsel. But neither retention of, nor request for, counsel seems essential, for in other situations the right to counsel, once established, has not depended on these factors. [Footnote omitted.]" (Note, *The Supreme Court, 1963 Term* (1964) 78 Harv.L.Rev. 143, 219; see, also, Note, *Waiver of the Right to Counsel in State Court Cases: The Effect of Gideon v. Wainwright* (1964) 31 U.Chi.L.Rev. 591, 602.

constitutional right to counsel it cannot be lost because he did not request or retain counsel. Resting its ruling upon earlier United States Supreme Court cases, the United States Court of Appeals for the Ninth Circuit in the very recent case of Wright v. Dickson (1964) 336 F.2d 878, 882, explained its position on this exact point: "Under the rule of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964), appellant was denied his constitutional right to assistance of counsel at the June 10 hearing if the investigation was then no longer a general inquiry but had focused on appellant (which seems incontrovertible), interrogation was conducted leading to incriminatory statements, appellant had requested and been denied counsel and appellant had not been effectively warned of his absolute constitutional right to remain silent. As Justice White pointed out in dissent, it makes no difference whether appellant asked to consult retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact might bear upon waiver." (Italics added; footnotes omitted.)

In *Escobedo* itself, Justice White's dissenting opinion, in which Justices Clark and Stewart concurred, pointed out: "Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel, cf. *Gideon v. Wainwright*, 372 U.S. 335; *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353, or has asked to consult with counsel in the course of interrogation. Cf. *Carnley v. Cochran*, 369 U.S. 506. At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter

is inadmissible in evidence unless the accused has waived his right to counsel." (378 U.S. at 495.)

Both the court of appeals and the dissent in *Escobedo* cite and rely upon the language of the United States Supreme Court in Carnley v. Cochran (1962) 369 U.S. 506, 513: ". . . it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request. In *McNeal v. Culver* [365 U.S. 109], *supra*, the petitioner's allegation that he had requested counsel was countered by a denial in the return that 'petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf,' and the State Supreme Court noted that the record was silent as to any request. We held that when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished 'whether or not the accused requested the appointment of counsel. *Uveges v. Pennsylvania*, 335 U.S. 437, 441.' " (See also Tompkins v. Missouri (1945) 323 U.S. 485, 487; Rice v. Olson (1945) 324 U.S. 786, 788; Gibbs v. Burke (1949) 337 U.S. 773, 780; Palmer v. Ashe (1951) 342 U.S. 134; Pennsylvania v. Claudy (1956) 350 U.S. 116.)

Massiah leaves unchallenged the statement in Carnley v. Cochran, supra, 369 U.S. 506, 514, that "requesting counsel" is a "formality upon which . . . his [defendant's] right may not be made to depend." Indeed, *Massiah* refers to New York cases which did not predicate the right to counsel upon a request. These cases sustained that right at post-indictment or post-arraignment interrogations without regard to whether the accused had asked for counsel. (People v. Di Biasi (1960) 7 N.Y.2d 544; People v. Waterman (1961) 9 N.Y.2d 561; People v. Meyer (1962) 11 N.Y.2d

162; People v. Rodriquez (1962) 11 N.Y.2d 279.) Further, in People v. Donovan (1963) 13 N.Y.2d 148, the New York Court of Appeals held that an accused had been denied his right to counsel if a lawyer hired by his family was not allowed to consult with him at the pre-indictment interrogation, even though he did not request such counsel.

Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.[6]

Although in the instant case defendant could have waived his right to the assistance of counsel, we can find no waiver here in the absence of evidence that he knew of his right. Thus *Escobedo* points out that an "accused may, of course, intelligently and knowingly waive . . . his right to counsel either at a pre-trial stage or at the trial." (378 U.S. at 490 n.14.) That defendant should be informed of such right

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6. As the court in *Escobedo* stated, "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' *abdication through unawareness of their constitutional rights.*" (Italics added.) (Escobedo v. Illinois, supra, 378 U.S. 478, 490.) The concurring opinion of Justice Traynor in People v. Garner (1961) 57 Cal.2d 135, 165, also recognizes the disadvantage inflicted upon an accused who is ignorant of legal process: "Giving an accused who has the means and foresight to retain an attorney (frequently the 'professional criminal') a right to counsel's presence during interrogation, would widen the gulf between the rights of a person with and one without counsel." (See also Barth, The Price of Liberty (1961) The Viking Press, New York, p. 162.)

in order to sustain an alleged waiver finds expression in Griffith v. Rhay (1960) 282 F.2d 711: "Since Griffith had a right to the assistance of counsel on the afternoon of the interrogation, his failure to request such assistance has significance only if it amounted to a waiver of that right. But a waiver is an intentional relinquishment or abandonment of a known right or privilege. A waiver cannot be effected unless it is intelligently and competently given." (*Id.* at p. 717.)

In the absence of evidence that defendant already knew that he had a right to counsel during interrogation, the failure of the officers to inform him of that right precludes a finding that he knowingly waived it.

Escobedo also holds that the accused has the right not to incriminate himself and to remain silent,[7] and that, if any self-incriminatory statements are to be admissible, he must waive that right. Such waiver presupposes knowledge of the right to remain silent; in the absence of evidence of such knowledge, the waiver requires a warning to the accused of that right.

Escobedo repeatedly emphasizes that defendant in that case had not been informed of his absolute right to remain silent at the accusatory stage and that he therefore had not waived the right. Thus the court states: "Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement." (Escobedo v. Illinois, supra, 378 U.S. 478, 485.)

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7. In Haynes v. Washington (1963) 373 U.S. 503, 511, the court referred to defendant's "right to remain silent." See also, Culombe v. Connecticut (1961) 367 U.S. 568, 631. In Griffith v. Rhay (1960) 282 F.2d 711, 717, it was assumed that "Griffith . . . had the right to remain silent." To the same effect, Crooker v. California (1958) 357 U.S. 433, 438. Cf. Payne v. Arkansas (1958) 356 U.S. 560, 567; People v. Simmons (1946) 28 Cal.2d 699, 720-721.

The court points out that under Johnson v. Zerbst (1938) 304 U.S. 458, "The accused may of course intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial," but explains that "no knowing and intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case." (Escobedo v. Illinois, supra, 378 U.S. 478, 490.) The court distinguishes Crooker v. California (1958) 357 U.S. 433, upon the ground "that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to 'say anything' in response to the questions. . . ." (Escobedo v. Illinois, supra, 378 U.S. 478, 491-492.)

Obviously, defendant could not waive the right to remain silent unless he knew of that right. As the court in Killpatrick v. Superior Court (1957) 153 Cal.App.2d 146, 150, said in discussing the privilege against self-incrimination, "The defendant . . . cannot be charged with a waiver of the privilege unless it appears that he was aware of its existence and its surrounding safeguards and voluntarily and intelligently elected to refrain from asserting it." (See also Trilling v. United States (1958) 260 F.2d 677, 694-696; Wong Son v. United States (1963) 371 U.S. 471, 486, fn. 12; People v. O'Bryan (1913) 165 Cal. 55, 62.)

Defendant here had the constitutional protection of an absolute right to remain silent; the prosecution could not introduce into evidence defendant's confession unless that right of silence were waived; in the absence of knowledge such waiver requires warning, but the officials gave no warning here.

We conclude, then, that defendant's confession could not properly be introduced into evidence because (1) the in-

vestigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.

Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions. Indeed, any statements obtained without coercion, including, of course, the unsolicited, spontaneous confession, given in the absence of the requirements for the accusatory stage, may be admitted into evidence.[8] As the concurring opinion of Justice Traynor in People v. Garner (1961) 57 Cal.2d 135, 164, states: "So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation."

Only when the investigatory stage has become an accusatory one, that is, when it has begun to focus on a particular suspect, the suspect has been taken into police custody, and the police have carried out a process of interrogations that lends itself to eliciting incriminating

8. The confession given in the following hypothetical situation put by the Attorney General is obviously admissible: "What about the person who is not known as a suspect but wants to confess an unsolved crime? . . . Shall the police stop him when he rushes into a police station and cries in distress that he wants to confess to a crime and tell him to be quiet until an attorney is obtained to represent him?" (Petition for Rehearing, p. 27.)

statements, does the doctrine of *Escobedo* apply and the confession given without the required warning or other clear evidence of waiver become inadmissible evidence. Moreover, an important consideration in determining whether the accusatory stage had thus been reached must be a careful concern that there be no interference with the legitimate police investigation of an unsolved crime.

Although the Attorney General urges that law enforcement will be severely handicapped by adhering to the requirements of rulings based on *Escobedo*, this argument as to law enforcement was raised in *Escobedo* itself and rejected by the United States Supreme Court. Moreover, we cannot overlook the consequences of a too restricted and limited reading of the decisions of the United States Supreme Court. Law enforcement will be harmed, not helped, by advising police officers, for example, that it is only when the suspect demands counsel that *Escobedo* applies, notwithstanding that in all other respects an investigation has reached the accusatory stage and the other conditions of *Escobedo* have been met. In such circumstances any confessions that might be obtained would, upon review by the United States Supreme Court, be subject to exclusion, and convictions based upon them, reversible. Meanwhile, before the overturning of such a decision, police officers would continue to follow the wrong practices. As a result, their work would come to naught. We have endeavored here to inform law enforcement officials at what stage of their investigations an accused must be informed of his constitutional rights in order that any confessions, admissions, or incriminating statements he may thereafter make to them will be legally admissible.

We cannot presume to evaluate the merits of the rulings of the United States Supreme Court; we merely apply

and enforce its decisions as we must. We note in passing, however, that many of the forebodings of law enforcement officials as to the effect of the rulings based on *Escobedo* have not been demonstrated by experience. Thus, prior to the rendition of the decisions, at least one of the larger counties of California,[9] the Federal Bureau of Investigation,[10] and the military[11] have substantially accepted the standards of the Supreme Court cases but have apparently encountered no serious impediments to law enforcement.

Finally, we cannot dispose of the introduction of the

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9. According to the Honorable John Nejedly, District Attorney of Contra Costa County, police officers of that county have advised suspects of their right to counsel ". . . at the moment that the police intended to arrest and felt that they had the facts sufficient to justify the arrest. . . ." (Assembly Com. on Criminal Procedure, San Francisco, July 21, 1964, at pp. 15-16.)

10. Prior to *Escobedo*, the Federal Bureau of Investigation informed an arrested person of his rights to counsel and to remain silent. Thus J. Edgar Hoover, the Director of the Federal Bureau of Investigation, some time ago stated that the Bureau's agents are instructed to give the constitutional warnings: "Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the service of an attorney of his own choice. . . ." Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI* (1951-1952) Iowa L.Rev. 175, 182. See also Report of the President's Commission on the Assassination of President Kennedy (1964) 619, 621, 625; Jackson v. United States (1964) 337 F.2d 136, 138; United States v. Ruehrup (1964) 333 F.2d 641, 644.

11. The Uniform Code of Military Justice provides that no suspect may be interrogated without first being warned of his right to make a statement and that any statement so made may be used against him. (10 U.S.C.A. § 831 (b).) The United States Court of Military Appeals has reversed convictions on the ground that criminal suspects were denied the right to consult counsel during an investigatory interrogation before charges had been filed and before his right to military counsel accrued. (United States v. Gunnels (1957) 23 C.M.R. 354; United States v. Rose (1957) 24 C.M.R. 251.)

illegally obtained confession upon the ground that it constituted merely harmless error. Although under some circumstances the introduction into evidence of statements obtained from a defendant during police interrogation in violation of his right to counsel and his right to remain silent may constitute harmless error, we are convinced that the error is necessarily prejudicial when the statements are confessions. Indeed, *Escobedo* itself follows Hamilton v. Alabama (1961) 368 U.S. 52, and White v. Maryland (1963) 373 U.S. 59, cases which do "not rest . . . on a showing of prejudice." (White v. Maryland, supra, at p. 60.)

The use of an involuntary confession results in a denial of due process and requires reversal "regardless of other evidence of guilt." (People v. Matteson (1964) 61 A.C. 511, 514; accord: People v. Brommel (1961) 56 Cal.2d 629, 634; People v. Trout (1960) 54 Cal.2d 576, 585; People v. Berve (1958) 51 Cal.2d 286, 290; Lynumn v. Illinois (1963) 372 U.S. 528, 537; Rogers v. Richmond (1961) 365 U.S. 534, 540-541; Payne v. Arkansas (1958) 356 U.S. 560, 567-568.)

The improper introduction of the confession which has been obtained in violation of the constitutional right to counsel transgresses the protection of due process no less than the illegal introduction of a confession which has been coerced. In either case courts cannot inquire into the prejudicial nature of the introduction of an illegally obtained confession for the reasons stated in People v. Parham (1963) 60 Cal.2d 378, 385: "Almost invariably . . . a confession will constitute persuasive evidence of guilt, and it is therefore usually extremely difficult to determine what part it played in securing the conviction. [Citation omitted.] These considerations justify treating involuntary confessions as a class by themselves and refusing to in-

quire whether in rare cases their admission in evidence had no bearing on the results." Thus in the instant case the improper introduction of the confession obtained in violation of a constitutional right compels reversal.

Summarizing the principal issue on the confession, we must decide this case in conformity with the decisions of the Supreme Court of the United States. That court having declared the content of a constitutional right, it is our function to enforce it in situations wherever it logically applies. To do otherwise would, in effect, be to distort the United States Constitution itself.

We cannot say here that because defendant did not speak the words of a request for counsel we need not apply the United States Supreme Court decisions; the constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself. We cannot compress a constitutional right, expressed by the United States Supreme Court, into the shape of a frozen formalism.

THE ALLEGED INCOMPETENCY AND INSUFFICIENCY OF THE EVIDENCE TO ESTABLISH A VALID IMPRISONMENT UNDER A LIFE SENTENCE

(a) *The alleged incompetency of the prosecution evidence to establish defendant's term.*

If defendant were validly incarcerated in San Quentin prison under an indeterminate life sentence, his guilt of malicious assault with a deadly weapon, which resulted in his fellow prisoner's death, would subject him to the death penalty automatically imposed by Penal Code section 4500. This court has consistently upheld the constitutionality of Penal Code section 4500 in its application to prisoners undergoing indeterminate life sentences. (See People v. Jefferson (1956) 47 Cal.2d 438, 442; People v. Wells (1949) 33 Cal.2d 330, 334-337; People v. Finley (1908) 153 Cal.

59, 62, affirmed in Finley v. California (1911) 222 U.S. 28, 31.)

Defendant urges that this court should change the above rule because of the adoption of the indeterminate sentencing procedure and because "the Legislature in 1901 in enacting" the automatic death penalty at no time contemplated the possible application of the statute to approximately one out of every three prisoners. Such a basic reconstruction of the statute must, however, lie with the Legislature. (See People v. Wells, *supra*, at p. 336.)

The homicide took place on December 12, 1961, at San Quentin prison; the prosecution adduced competent evidence to establish that defendant was then imprisoned there under an indeterminate life sentence.

Robert Powers, the record clerk at San Quentin State Prison, testified that he served as official custodian of all inmate records and that he supervised entries upon each prisoner's Warden's Inmate Record Card concerning the fixing of terms and paroles based upon certifications of Adult Authority action. Clearly the custodian of records may competently testify concerning such entries and their sources (See People v. Jefferson (1956) 47 Cal.2d 433, 443; People v. Wells (1949) 33 Cal.2d 330, 338.) Indeed, defense counsel stipulated that the inmate record card indicating that defendant was serving a life term could be admitted into evidence.

The prosecution also properly introduced the certifications of Adult Authority action, which constituted competent evidence to establish that defendant's term was unfixed on the date in question. (See In re Smith (1949) 33 Cal.2d 797, 800-801; Code Civ. Proc., § 1918, subd. (6); Pen. Code, § 969, subd. (b).) Finally, defendant's testimony tended to corroborate these records since he revealed an

awareness that upon his return to prison following a parole violation, his sentence had been increased to maximum.

This evidence shows that defendant originally suffered imprisonment in 1957 for violation of Health and Safety Code section 11500 and that he received a sentence for the term then prescribed by law of five years to life. After the Adult Authority twice redetermined defendant's term following his imprisonment, it finally released him on parole in the spring of 1961. At the time defendant violated his parole, the relevant certification of Adult Authority action dated June 22, 1961, states: "Parole cancelled—return to prison ordered for the reasons set forth in the report of which this order is a part. (Term refixed at maximum in accordance with Resolution adopted 3-6-51.)"

Resolution No. 171 of the Adult Authority adopted March 6, 1951, provides that "effective April 1, 1951, when paroles are cancelled, suspended, and/or revoked, the previous action fixing term will be rescinded . . . and the prisoner shall be considered as serving the maximum term as prescribed in the Indeterminate Sentence Law, subject to further order of the Adult Authority. . . ." After its order of June 22, 1961, the Adult Authority did not redetermine or refix defendant's term. The effect of that order, by reference to resolution No. 171, was to reset defendant's term at five years to life. Thus on the date of the crime, December 12, 1961, defendant was undergoing an indeterminate life sentence and was subject to Penal Code section 4500.

Defendant argues that in *Wells* and *Jefferson*, *supra*, defendant's term *had not been fixed*, and hence the evidence in those cases sufficiently proved that defendant "was a person undergoing a life sentence" under Penal Code section 4500, but that here the term had been originally fixed

at five years and the certifications of the Adult Authority cannot suffice to prove anything more. To reach this strained result, however, defendant must completely ignore the order of June 22, 1961, and its reference to "Resolution Adopted 3-6-51."

(b) *The alleged invalidity of the order of the Adult Authority of June 22, 1961.*

We find no merit in defendant's contention that the June 22, 1961, order of the Adult Authority must fail for the following alleged three reasons: (1) It violated defendant's constitutional rights since the Adult Authority proceeded without affording to him notice or the opportunity for a hearing. (2) The prosecution failed to establish that the Adult Authority based its revocation of defendant's parole, and the increase in his term, upon good cause. (3) Defendant suffered double jeopardy in that, without according him a full hearing, the Adult Authority redetermined, and thereby increased, his term, which had theretofore been fixed.

No statute requires that the Adult Authority in exercising its jurisdiction to determine and redetermine sentences shall give the prisoner notice or a hearing. (In re McLain (1960) 55 Cal.2d 78, 84-85; In re Smith (1949) 33 Cal.2d 797, 803, 805; Pen. Code, § 3020.) The Penal Code specifically grants the Adult Authority power "to suspend, cancel or revoke any parole without notice." (Pen. Code, § 3060.) "The provisions for determining or redetermining sentence and for granting, suspending or revoking parole do not violate due process because of the absence of a requirement for notice or hearing." (In re McLain (1960) 55 Cal.2d 78, 85.)

The evidence does establish the good cause which must be the predicate for the revocation of defendant's parole

and the increase in his term. To redetermine a sentence or to suspend or revoke parole the cases clearly require a showing of good cause (In re McLain (1960) 55 Cal.2d 78, 87); such "cause must be stated in the order suspending or revoking the parole." (Pen. Code, § 3063.) A disputable presumption supports the conclusion that the minute entry on the certification of Adult Authority action correctly states the action taken by that body, including the fact that good cause existed for revocation of parole. (In re Smith (1949) 33 Cal.2d 797, 801; Code Civ. Proc., § 1963, subd. 15.) Defendant alleges no facts and submits no evidence to rebut such presumption; on the contrary, defendant testified at the trial that his parole was revoked when he surrendered himself for violating its terms by the use of narcotics. He stated then that at the narcotic treatment unit at Chino he "got involved with somebody else and I stuck up for the guy and I got violated and sent to San Quentin." The record manifests good cause.

Finally, the action of the Adult Authority in refixing sentences and perhaps increasing their length does not constitute double jeopardy. To support his contrary contention, defendant cites the cases of United States v. Benz (1931) 282 U.S. 304, and Ex parte Lange (1873) 85 U.S. (18 Wall.) 163, but these cases hold only that a *court of record* may not increase a penalty already imposed without unconstitutionally subjecting the defendant to double jeopardy.

Defendant received notice of, and a hearing on, the charge for which he was originally convicted; thereafter, he was subject to the executive orders of the Adult Authority. The original ". . . proceedings resulted in a conviction and the imposition of a sentence that was inde-

terminate, and until fixed, amounted to a maximum sentence provided for the crime in question. When the Authority reduces a maximum sentence, its action, in the very nature of things, is tentative and may be changed for cause. Such procedure presents no federal question." (In re McLain, supra, 55 Cal.2d 78, 85.)

THE ALLEGED FAILURE OF THE COURT PROPERLY TO INSTRUCT THE JURY.

Defendant contends that the court should have instructed the jury in the following manner: (1) That the jury determine the factual issue whether defendant was actually serving a life sentence at the time of the commission of the homicide. (2) That the jury consider the lesser included offenses of assault with a deadly weapon by a prisoner not undergoing a life sentence (Pen. Code, §4501) and battery by a prisoner not undergoing a life sentence (Pen. Code, § 4501.5). (3) That the jury consider the possible alternative of finding defendant guilty of murder (Pen. Code, § 187), attempted murder (Pen. Code, § 217) or manslaughter (Pen. Code, § 192).

Defendant does not allege that the court rejected such instructions, nor does the clerk's transcript include any rejected instructions; we must, therefore, assume that defendant did not request them. The issue then becomes whether the court must render these instructions on its own motion. We cannot uphold such a requirement.

The court properly instructed the jury and twice repeated the elements of the charged offense; it emphasized that the plea of not guilty placed in issue "every material allegation." Thus the court directly presented to the jury the question of whether defendant was undergoing a life

sentence: we see no reason for holding that the court should have further underscored this issue. (People v. Jefferson (1956) 47 Cal.2d 438, 444.)

Nor did the court err in failing to instruct the jury concerning the lesser included offenses specified by defendant. This court has repeatedly held that even those instructions requested concerning lesser included offenses need not be given in the face of a charge of violation of Penal Code section 4500. (See People v. Jefferson, supra, 47 Cal.2d 438, 444; People v. Oppenheimer (1909) 156 Cal. 733, 745; People v. Carson (1909) 155 Cal. 164, 175-177.) Moreover, the trial court instructed the jury on the subject of malice as well as assault with a deadly weapon, so that defendant did not suffer a total deprivation of instructions on lesser offenses. In any event, no prejudice resulted from the presence or absence of such instructions because defendant was clearly a life-termer.

The judgment is reversed.

TOBRINER, J.

WE CONCUR:

TRAYNOR, C. J.

PETERS, J.

PEEK, J.

DISSENTING OPINION

I dissent. I would affirm the judgment finding defendant guilty of violating section 4500 of the Penal Code,* for these reasons:

First. Escobedo v. Illinois, 378 U.S. 478, relied on by the majority opinion, is not applicable to the facts of the present case.

In that case, the court said: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (P. 492.)

Referring to the "circumstances here" (that is, in Escobedo v. Illinois, supra), the court said: "We hold, therefore, that where, as here, (1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect has been taken into police custody, (3) the police carry out a process of interrogations that lends itself to eliciting incriminating statements, (4) *the suspect has requested and been denied an opportunity to consult with his lawyer*, and (5) the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obliga-

*Section 4500 of the Penal Code provides, in part: "Every person undergoing a life sentence in a state prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death. . . ."

tory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (378 U.S. 490 et seq.) (Numbers and italics added.)

It is conceded in the instant case that element No. 4 was not present, that is, defendant did not request, and was not denied, an opportunity to consult with his lawyer.

Under the precise and limiting language used by the Supreme Court in the *Escobedo* case, it is clear that the facts in the instant case are different and that the *Escobedo* case is not applicable.

We should not extend the rule of the *Escobedo* case. This court should take a realistic view of the holdings in Escobedo v. Illinois, supra, so as to support law enforcement officers when their activities are not clearly unlawful, and not to increase their difficulties in preventing future murders and other crimes.

We should support them in their lawful efforts, however zealous, to protect citizens and to eliminate crime and enforce the laws of this state. We should not take an unrealistic view of the rules of law and make it more difficult to apprehend criminals and to prevent and reduce the increase of crime which has taken place at an alarming rate in the past year.

In People v. Hartgraves, 202 N.E.2d 33, the Supreme Court of Illinois, in discussing Escobedo v. Illinois, at page 36 said: "We do not, however read the Escobedo case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt."

Second. Article VI, section 4½, of the California Constitution, in my opinion, requires an affirmance of the judgment in this case. That section provides: "No judgment shall be set aside . . . in any case, on the grounds of . . . the improper admission . . . of evidence . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, *the court shall be of the opinion* that the error complained of has resulted in a miscarriage of justice." (Italics added.) (See People v. Hines, 61 A.C. 148, 159 et seq., 166 et seq.)

An examination of the record in the present case leads me to the "opinion" that there is no doubt of the guilt of defendant and that he was not prejudiced by not being advised of his right to counsel. He had been convicted of previous criminal offenses, and there is a presumption that on such occasions he was informed of his right to counsel. (Code Civ. Proc., § 1963, subd. 15.) In addition, he had been in the state penitentiary, and it is a matter of common knowledge that the inmates discuss their rights and are informed, among other things, of their right to counsel.

I am thoroughly in accord with Mr. Justice Schauer's statement in his dissenting opinion in People v. Hines, supra, 61 A.C. 148, 165: "The mandate of section 4½, article VI, is clear and is unequivocally recognized by this court in People v. Watson (1956) supra, 46 Cal.2d 818, 836-837 [12]; likewise clear is the limitation of section 4 on our powers of review to 'questions of law alone, in all criminal cases where judgment of death has been rendered.' These are not just statutes; these are constitutional bulwarks. By these sections the People, properly concerned for their own (and loved ones') safety, have demonstrated that a judgment of death, once rendered, is not lightly to be set aside. Mere speculation that judicially declared pro-

cedural error *may* have contributed to the verdict is not a basis upon which we can lawfully disturb a judgment of death. The verdict is not ours; it is that of the jury. And the judgment is that of the trial court duly rendered pursuant to the verdict. We have neither right nor power to reverse that judgment unless the evidence before us (the totality of the record) establishes not only error but the probability—i.e., preponderates in showing—that a result more favorable to defendant would have been reached in the absence of the error.

"It bears repeating that in Watson we said '[T]he test, as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated.' (People v. Watson (1956) 46 Cal.2d 818, 837 [12] [299 P.2d 243].) Today, in the case at bench, it appears to me that by the majority's ruling 'the entire purpose of the constitutional provision [is] defeated.' "

Again, it is my opinion that the judiciary should consider the protection of innocent people in this state and endeavor to support law enforcement officers in their efforts to prevent the increase of crimes now taking place at an alarming rate in this and other states of the United States.

We should recognize that the prevention of crime may be best enforced by the prompt conviction and punishment of criminals and should endeavor in every legitimate manner to protect our innocent citizens and to avoid unnecessary reversals of conviction of manifestly guilty criminals, thereby better protecting the law-abiding public.

McComb, J.

DISSENTING OPINION

In *Escobedo v. Illinois*, 378 U.S. 478, the Supreme Court of the United States repeatedly limited the application of the rules it was establishing to circumstances such as were present in that case. Such expressions as "Under these circumstances," and "Where, as here," are utilized repeatedly, indicating that the court did not intend such rules to be applied universally regardless of the circumstances of the particular case.

This cautionary qualification is reiterated in the Supreme Court's reference to the holding in *Crooker v. California*, 357 U.S. 433, which the Supreme Court stated did not compel a result contrary to its ruling in *Escobedo*. The court stated: "In that case [*Crooker*] the Court merely rejected the absolute rule sought by petitioner, that 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard* to the circumstances of the case.' *Id.*, at 440. (Emphasis in original.) . . . The Court, applying 'these principles' to 'the sum total of the circumstances [there] during the time petitioner was without counsel,' *id.*, at 440, concluded that he had not been fundamentally prejudiced by the denial of his request for counsel. Among the critical circumstances which distinguish that case [*Crooker*] from this one [*Escobedo*] are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to 'say anything' in response to the questions, *id.*, at 437, and that petitioner there, but not here, was a well-educated man who had studied criminal law while attending law school for a year." In this reference to *Crooker* the Supreme Court again stresses that each case

must be weighed in relation to the totality of its own circumstances. *Crooker* was distinguished from *Escobedo,* in part, because Danny Escobedo was "a 22-year old of Mexican extraction with no record of previous experience with the police," *Escobedo,* at page ...., whereas Crooker, as noted, was a well-educated man who had knowledge of criminal law.

Similarly, here, Dorado was a 26-year-old convict serving a life term in prison for sale of narcotics at the time the malicious assaults with a deadly weapon, resulting in a fellow prisoner's death, were charged against him.

Justice McComb notes in his dissent that Dorado had been convicted of previous criminal offenses, and there is a presumption that on such occasions he was informed of his right to counsel upon arraignment and during trial. (Code Civ. Proc., § 1963, subd. 15.) In addition, he had been in the state penitentiary and it is a matter of common knowledge that the inmates discuss and are well aware of their constitutional rights.

The degrees of sophistication in criminal matters of Danny Escobedo and Robert Dorado are poles apart, and the "circumstances" of this case differ so widely from those of *Escobedo* as to render the rules laid down in *Escobedo* inapplicable in this case.

Justice McComb alludes to the further distinguishing feature that one of the basic elements of the *Escobedo* rule is not present in this case, namely, that "(4) *the suspect has requested and been denied an opportunity to consult with his lawyer.*" The majority opinion recognizes this distinction but holds that the failure of the accused to request counsel does not justify "the application of a rule of law different from that established in *Escobedo.* The basic reasoning of the court's opinion in *Escobedo* will not

permit such a formalistic distinction" and, further, that "The right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it. The accused's request for counsel indicates no more than that he, himself, at that point in the proceedings, perceived the need of legal assistance. The request merely constitutes evidence that the accused finds himself in an accusatory predicament."

I concur in the view of the majority that the right to be furnished counsel and to be advised of the right to counsel does not depend upon a request. If the contrary were the rule it would favor the prison-wise criminals and discriminate against the ignorant, the uneducated or the mentally retarded. I agree with the majority that "the constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself." I differ with the majority in its apparent assumption that in every case, regardless of distinguishing circumstances, if such accusatory stage has in fact been reached, no confessions elicited from the accused by interrogations of the police may be properly received in evidence unless it be shown that the accused was expressly advised by his interrogators of his right to remain silent and of his right to counsel or he has knowingly waived such right. I believe the crucial test at the accusatory stage is whether we may reasonably infer from the circumstances (and this, the United States Supreme Court makes clear, means *all* the circumstances) of the particular case that the accused was aware of his constitutional rights. This is the test that court applied in both *Crooker* and *Escobedo*.

Were the accused a law professor, a lawyer or a former policeman, under the holding of the majority, before the confession of such a person would be admissible, it would

be necessary to show that during the process of interrogation and before the incriminating admissions were obtained, the accused had been informed of his constitutional rights or had waived them. Under *Escobedo* the test to be applied by the trial court or a reviewing court would be: Under the "sum total of the circumstances" of the particular case, was the law professor, lawyer or former policeman "fundamentally prejudiced" by the failure of the interrogators to inform him at that time of his right to counsel and of his right to remain silent?

Forearmed with the rule of *Escobedo*, it would be better practice for police during such an interrogation to routinely advise the accused of his rights, thereby avoiding conjecture at the trial and appellate level of the effect of failure to so advise him. However, absent a showing that such advice was given, this court should not extend the rule of *Escobedo* so that as a matter of law, rigid and inflexible, and notwithstanding the degree of sophistication or the criminal record and experience of the accused, no confession thus obtained may be received in evidence.

As noted, the majority holds that the mere utterance of the words, "I want a lawyer," do not create the right to counsel—it is the totality of the circumstances present which brings that right into maturity; similarly, it is not the mere utterance of the words, "You are entitled to an attorney and to remain silent," which render admissible in evidence the subsequent utterances of the accused. It is the "sum total of circumstances" present which must be weighed to determine whether the accused was unaware of his rights and, therefore, was "fundamentally prejudiced." There are many situations where the mere utterance of such words by an interrogator would not render a subsequent confession admissible. Thus, the accused's awareness

of his constitutional rights is the crucial test and not whether someone informed him of such rights immediately before eliciting the incriminating statements.

The circumstances present in *Dorado*, established by the record, indicate that as a previously convicted felon he had been informed of his constitutional rights. His degree of criminal sophistication establishes this as fully as did the one year of legal education establish knowledge and waiver in *Crooker*. Such interpretation does not present any inconsistency between the rule in *Crooker* and that in *Escobedo*. "Under the circumstances" of this case, namely, the defendant's criminal sophistication, there is known, not presumed, waiver of any purported right to be unnecessarily advised of that which he already knows.

The mandate of section 4½ of article VI of the California Constitution requires this court to review the entire record to determine not only if there was error in the admission of evidence, as is asserted here with respect to Dorado's confession to the authorities, but the probability that a result more favorable to the defendant would have been reached had the error not been committed. In applying this constitutional test I firmly believe that no reversal is justified, that the verdict of the jury should be upheld and the judgment of the trial court affirmed.

For these reasons I dissent.

BURKE, J.

I CONCUR:

SCHAUER, J.*

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.